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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

THOMAS S. KLEPPE, *et al.*, *Petitioners*,

v.

SIERRA CLUB, *et al.*, *Respondents*.

AMERICAN ELECTRIC POWER SYSTEM, *et al.*, *Petitioners*,

v.

SIERRA CLUB, *et al.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE CARTER OIL COMPANY AS AMICUS CURIAE

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THE INTEREST OF THE AMICUS CURIAE

The Carter Oil Company ("Carter"), having obtained consent from each party, submits this brief as *amicus curiae* in support of the position of the peti-

tioners.[1] The basic facts underlying Carter's interest in this litigation are as follows.[2]

For more than eight years Carter has been working to develop a major coal-mining enterprise in the Eastern Powder River Coal Basin of Wyoming. In 1967 the United States Department of the Interior held a competitive lease sale covering, among other land, a tract of some 5,400 acres in Wyoming, on which the high bid of over $900,000 was submitted on Carter's behalf. (Federal Coal Lease W-5036) Carter subsequently either purchased or obtained options to purchase all surface land overlying the lease (except for approximately 40 acres that is public domain land) and in April 1973 submitted to the Department of the Interior a plan for the mining of the coal resources of the lease and for reclamation of the lands subsequent to mining. The Department of the Interior prepared and issued on October 18, 1974, a six-volume Final Environmental Impact Statement for the Development of Coal Resources in the Eastern Powder River Coal Basin of Wyoming. The adequacy of that impact statement has not been challenged in any judicial proceeding. Part IV of that final statement consists of a 173-page analysis of the environmental consequences of the Carter mining and reclamation plan. Carter signed a 30-year sales contract on January 17, 1974 with a

[1] Copies of Carter's requests for the consent of each party to the filing of this brief, and the affirmative replies thereto, have been filed with the Clerk of this Court.

[2] Carter's interest is described in further detail in its *amicus* brief filed in this Court on October 16, 1975 in support of the petitions for writs of certiorari and in the Affidavit of Harry Pistole, President of Carter, filed in the Court of Appeals on October 30, 1975 in support of petitioners' motion to dissolve the injunction.

major electrical utility company, under which Carter is called upon to deliver five million tons of low-sulphur coal per year from this lease, with deliveries scheduled to begin in mid-1976. By virtue of delays occasioned by the Court of Appeals' injunction, that delivery date cannot possibly be met.

In aid of its proposed mining operations Carter has commenced extensive construction of off-lease surface facilities for site preparation costing, through July 31, 1975, approximately $8,200,000. Through that date, Carter's total expenditures in furtherance of the proposed operation have amounted to approximately $12,800,000, and an additional $11,200,000 is contractually committed for the coming two years.

The injunction entered by the Court of Appeals has totally disrupted Carter's project at a very substantial cost, both in terms of money and in terms of relations with equipment suppliers, employees, customers, and ultimate consumers of electrical energy. Any additional delay in the project will compound the problems encountered by these affected persons.

ARGUMENT

Carter adopts the arguments of the Federal petitioners and the intervenors in support of reversal of the judgment of the Court of Appeals and reinstatement of the judgment of the District Court.

In dismissing respondents' complaint, the District Court concluded that the Secretary of the Interior was not obliged under NEPA to prepare an environmental analysis of all possible coal development which might or might not occur in future years over a four-state area in the western United States. The basis for the

court's decision was that there existed no area-wide federal proposal or plan relating to such possible development; hence there was no proposal on which an environmental impact statement could be written. (Pet. 75-552, App. D, 85A-101A) *See* 42 U.S.C. § 4332(2)(C). The Court of Appeals accepted the District Court's findings, and indeed specifically noted respondent's concession that no region-wide proposal existed for the four-state area. (*Id.*, App. A, 27A) The Court of Appeals nevertheless reversed the District Court and ordered the Secretary to reconsider his decision not to prepare an impact statement on a region-wide program that does not exist.

This decision was clearly erroneous and is a most unfortunate precedent for the proper administration of the National Environmental Policy Act. As this Court has stated, in "order to decide what kind of environmental impact statement need be prepared, it is necessary first to describe accurately the 'federal action' being taken." *Aberdeen & Rockfish R. R.* v. *SCRAP*, 422 U.S. 289, 322 (1975). Thus an impact statement can intelligently be prepared only *after* a federal proposal has been formulated, and not before. 422 U.S. at 320. Otherwise the impact statement would be dealing with speculation. This seemingly obvious point is particularly applicable in the present case. No truly coherent or useful impact statement could be written on all the possible forms and varieties of coal development which might or might not occur in the Northern Great Plains area in future years, since the course of that development will depend on a myriad of factors as yet unknown, including the actions of state and local governments and applications for federal approvals to be filed by private parties.

This is not to say that development should be disorderly or that planning should not occur. The record in this case demonstrates that the federal petitioners, with the cooperation of private parties and affected local and state governments, have undertaken extensive resource studies and planning efforts on a variety of levels and concerning a variety of geographic areas. And with respect to the Eastern Powder River Coal Basin, the Secretary in a massive joint impact statement has analyzed the pending mining and reclamation plans and related applications of a number of private parties centering in that area. His decision to proceed with that impact statement was eminently reasonable. Yet respondents contend that because the Secretary has also undertaken other environmental studies, it is now necessary to penalize the entire national effort to develop additional energy resources by requiring a halt to all new development of federal coal in the four-state area until yet another and necessarily speculative impact statement for the four-state area is prepared. The Court of Appeals' endorsement of that contention is a crippling decision, not just for the development of the nation's energy resources but also for many unrelated programs of other departments and agencies of the federal government.

The impact of that decision on Carter has been very serious. For more than eight years Carter has been working to begin operations of a coal mine in Wyoming, including the expenditure of enormous effort and millions of dollars to develop and initiate an environmentally sound mining and reclamation plan, ~~on~~ which basis the Department of the Interior has prepared an unchallenged 173-page analysis of Carter's proposal as part of the final impact statement cover-

ing a 4,978,560-acre area. It is imperative that Carter now be permitted to proceed. Further delays would work a serious hardship upon the company, its employees, its customers who are in need of low-sulphur coal, and upon a wide segment of the general public. The ability of American industry to help meet the energy needs of this country has been substantially impaired by the decision below without adequate justification. Accordingly, the erroneous application of NEPA by the Court of Appeals should not be permitted to stand.

CONCLUSION

Carter, as *amicus curiae,* urges that the judgment of the Court of Appeals be reversed and the case remanded with instructions to affirm the judgment of the District Court.

Respectfully submitted,

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